No. 73-5135

OCT 1 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

JAMES A. BURKE, et al.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,
DONALD E. JOHNSON, Administrator
of Veterans' Affairs, et al.,

Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PETITION NOT PRINTED
RESPONSE NOT PRINTED

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VERGARA PRINTING CO. - SANTA FE, NEW MEXICO

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
ISSUE PRESENTED	2
ARGUMENT IN FAVOR OF GRANTING THE PETITION	2
INTRODUCTION	2
1. THE WRIT SHOULD ISSUE BECAUSE IT IS A CASE OF FIRST IMPRESSION AND PRESENTS A CASE OF SUBSTANTIAL PUBLIC IMPORTANCE	4
2. THE WRIT SHOULD ISSUE AS THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH EVERY SIMILAR DECISION OF THIS COURT	4
CONCLUSION	6

TABLE OF AUTHORITIES CITED

Frontiero v. Richardson, _____ U.S. _____, 93 S.Ct. 1766, 36 L.Ed.2d 583 (1973)	5
Jefferson v. Hackney, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972)	5
Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971)	5
Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971)	5
United States Department of Agriculture v. Moreno, _____ U.S. _____, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973)	5
Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 at 175, 92 S.Ct. 1400 at 1407, 31 L.Ed.2d 768 (1972)	5

STATUTES

United States Supreme Court Rule 42(4) 1
38 U.S.C. 211(a) 4
38 U.S.C. 1651 et seq. 2
38 U.S.C. 1700 et seq. 2
38 U.S.C. 1795 . . . . . 2, 3
Section 74-1-5, N.M.S.A., 1953 Comp. 2

MISCELLANEOUS

86 Har. L. Rev. 1 (1972) 5
82 Yale L.J. 123 (1972) 5

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

The New Mexico Veterans' Service Commission, through its Attorney General, respectfully prays that this Honorable Court accept this Brief in support of Petition For A Writ Of Certiorari in the above-entitled case, pursuant to Rule 42(4) of the Rules of this Court. The respondent, through the office of the Solicitor General, has been sent a copy of this brief.

INTEREST OF AMICUS CURIAE

Traditionally, a large proportion of the New Mexico population has served in the armed forces of the United States. The New Mexico Veterans' Service Commission is charged with the duty of assisting veterans and their families in asserting their rights and privileges with respect to the various programs created for their benefit. Section 74-1-5, N.M.S.A., gives the Commission the duty of assisting veterans, their widows and children in the prosecution of claims against the United States and assisting such persons in the establishing of all rights and the procurement of all benefits which may have accrued. It is, therefore, in the interest of the Veterans' Service Commission to seek to end such a patently arbitrary and unfair classification in the field of veterans' benefits as this case presents.

Additionally, Amicus is concerned that the *pro se* posture of this case may possibly work to the detriment of a valid and substantial issue of public interest.

ISSUE PRESENTED

The issue presented in this case is whether Congress can constitutionally deny full veterans' educational benefits (38 U.S.C. 1651 et seq.) to that class of veterans who have, prior to their service, received educational benefits pursuant to the War Orphans' Assistance Act (38 U.S.C. 1700 et seq.).

ARGUMENT IN FAVOR OF GRANTING THE PETITION

Introduction

38 U.S.C. 1795 creates a 48 month limitation for which any combination of benefits administered by the Veterans' Administration may be received. Included therein are the War Orphans' Assistance Act and the Veterans' Rehabilitation Act. A veteran, such as petitioner herein, who became eligible for War Orphan's benefits because of the death or total disability of his father, is therefore precluded from obtaining the full amount of veteran's benefits when he becomes a veteran if his combined benefits

total more than 48 months. Separately, each program has a 36 month eligibility program. Thus, the war orphan-veteran, seeking to return to school after his service, is entitled only to 12 months under the Veterans' Act if he used the full 36 month eligibility under the War Orphans' Act prior to his service. His fellow veterans who did not receive any War Orphans' benefits are entitled to the full 36 month maximum while pursuing the same course of study.[1] Thus, Section 1795 creates a patently arbitrary classification which denies full and equal educational benefits to a class of veterans solely because of prior war orphan eligibility which arose pursuant to a wholly independent set of facts and totally unrelated to their status as veterans. As such it is inconsistent with the purposes of both the War Orphans' Act and the Veterans' Rehabilitation Act,[2] and is so unreasonable and fundamentally unfair as to constitute a denial of due process.

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1. We agree with petitioner that the case would be very different if Congress had seen fit to limit all veterans to a particular educational level, e.g., a four-year college education. As petitioner notes, however, Congress has not done so. See 38 U.S.C. 1652.

2. The purpose of the War Orphans' Act is:
The Congress hereby declares that the educational program established by this chapter is for the purpose of providing opportunities to children whose education would otherwise be interrupted by reason of the disability or death of a parent from a disease or injury incurred or aggravated in the Armed Forces after the beginning of the Spanish-American War, and for the purpose of aiding such children in attaining the educational status which they might normally have aspired to and obtained but for the disability or death of such parent. The Congress further declares that the educational program extended to the widows who died of service-connected disabilities and to wives of veterans with a service-connected total disability permanent in nature is for the purpose of assisting them in preparing to support themselves and their families at a standard of living level which the veteran, but for his death or service disability, could have expected to provide for his family. 38 U.S.C. 1700.

The purpose of the Veterans' Rehabilitation Act is:
The Congress of the United States hereby declares that the education program created by this chapter is for the purpose (1) of enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, (3) providing vocational readjustment and restoring

Continued on following page

1. The Writ Should Issue Because It Is A Case Of First Impression And Presents A Case Of Substantial Public Importance.

This case presents an appropriate issue to be decided by this Court. It concerns two statutory programs which have never been interpreted by this Court, and is presently of great public importance as it affects and will affect the educational opportunity of many returning veterans. Additionally, present and future recipients of War Orphans' benefits have a legitimate interest in having this question decided as it will bear upon future plans of military service and later education.

Very probably, a major reason for the lack of judicial precedent in this area is 38 U.S.C. 211(a), which precludes judicial review in matters administered by the Veterans' Administration. Since this Court has granted certiorari in the case of *Hernandez v. Veterans' Administration,* No. 72-700, and has granted review in *Johnson v. Robison,* No. 72-1297, which concern the application of veterans' educational benefits to conscientious objectors who have performed alternative service, as well as the jurisdictional question, it would seem an extremely appropriate time to review the propriety of the combined limitation section as it affects members of the petitioner's class, i.e., persons whose families have served their country for two generations.

2. The Writ Should Issue As The Decision Of The Court Of Appeals Is Inconsistent With Every Similar Decision Of This Court.

The opinion of the Ninth Circuit finds no justification other than fiscal saving for the denial of full benefits to the war orphan veteran. (Opinion, P. 3, lines 1-4). In spite of that fact, the court concluded that the "purpose of the programs and the limitations upon the total entitlement support a rational and rea-

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lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country. 38 U.S.C. 1651.

sonable governmental interest." (P. 4, lines 23-27). Obviously, the court confused the propriety of the two programs generally with the propriety of excluding a particular group therefrom.

It would seem that the Ninth Circuit has fashioned a completely new test to be applied in the doctrine of equal protection or at least in such cases involving veterans' benefits. That test is: once the government is found to have a legitimate interest in creating a program of benefits, it has plenary power to deny those benefits to any class no matter how arbitrary the denial, if the denial does, as it must, save the government money. Amicus respectfully suggests that that holding does not correctly state the law. Since that error will affect all members of petitioner's class, probably all aggrieved veterans, and possibly all persons protesting equal treatment under law, this case should be decided by this Court.

This Court has applied the equal protection concepts of the Fourteenth or Fifth Amendments in several recent cases. That test, in general, requires an inquiry into the purposes of the legislative scheme, and, if a purpose of that scheme is found to be valid, the challenged discrimination is studied to determine whether the discrimination bears a rational relationship to that purpose. See, e.g., *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 at 175, 92 S.Ct. 1400 at 1407, 31 L.Ed.2d 768 (1972); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 225 (1971). See also Gunther, "Foreward: In Search of Evolving Doctrine on a Changing Court; A Model for a Newer Equal Protection", 86 Har. L.Rev. 1 (1972); and "Legislative Purpose, Rationality and Equal Protection", 82 Yale L.J. 123 (1972).

This Court has also dealt with the equal protection concept in such cases as *United States Department of Agriculture v. Moreno*, ____ U.S. ____, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973), which struck down a restriction on food stamp eligibility, *Frontiero v. Richardson*, ____ U.S. ____, 93 S.Ct. 1766, 36 L.Ed. 2d 583 (1973), which invalidated a classification involving military benefits, *Jefferson v. Hackney*, 406 U.S. 535, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972), which upheld a welfare classification, and *Richardson v. Belcher*, 404 U.S. 78, 92 S.Ct. 254,

30 L.Ed.2d 231 (1971) which upheld a section of the Social Security Act.

In this case it is apparent that the Ninth Circuit satisfied itself with an inquiry only into the first test and did not seek to reconcile the inequitable denial of veterans' benefits to war-orphan veterans, to the purposes of the acts in question. Since that error will affect a great many persons, both within the Ninth Circuit and without, Amicus Curiae respectfully urges this Court to hear this case.

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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